88-1928

No.

Supreme Court, U.S.
FILED
MAY 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

STEVEN A. TYLER, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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MAY 1989

QUESTION PRESENTED

Was petitioner deprived of his Sixth Amendment right to confrontation when the trial court sustained a prosecution objection to an attempt to impeach a government informant's testimony through cross-examination concerning a fraudulent insurance claim filed by the informant?

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No.

STEVEN A. TYLER, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Steven A. Tyler, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case.

OPINIONS BELOW

The opinion of the Air Force Court of Military Review is reprinted at 26 M.J. 680 (A.F.C.M.R. 1988) and is reproduced in the appendix to this petition ("Pet. App.") at page 2a. The United States Court of Military Appeals granted review and summarily affirmed. __ M.J. __ (C.M.A. March 31, 1989), Pet. App. 1a.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on March 31, 1989. The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h)(Supp III 1985) and 28 U.S.C. § 1259(3)(Supp III 1985).

CONSTITUTIONAL AND REGULATORY PROVISION

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . .

Rule 608 of the Military Rules of Evidence, Manual for Courts-Martial, United States, 1984 ("M.C.M., (1984)") provides, in pertinent part:

> **Rule 608. Evidence of character, conduct, and bias of witness**
>
> * * *
>
> **(b)** *Specific instances of conduct.*
>
> Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in Mil.R.Evid. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.
>
> * * *

STATEMENT OF THE CASE

Petitioner was convicted, contrary to his pleas, by an Air Force court-martial of various offenses involving co-

caine (distribution on three occasions, use on three occasions) and marijuana (a single use). He was sentenced to be dishonorably discharged from the service, to be confined for ten years, to forfeit all pay and allowances, and to be reduced to airman basic.

The government's case relied heavily on the testimony of an informant, Sergeant Mark C. Baker. He identified the petitioner as a target for a number of controlled buys which were conducted by the Air Force Office of Special Investigations (OSI). Although certain aspects of the buys were controlled, the actual exchanges of drugs and money were not observed by OSI agents, but were supported solely by the testimony of Sgt Baker. Thus, Sgt Baker's credibility was a key issue in the trial. The petitioner did not testify regarding the offenses.

In the course of cross-examining the informant, the defense counsel attempted to elicit an admission from Sgt Baker that he had previously filed a fraudulent claim with an insurance company.[1] (R. 265-272). Once the informant denied making a fraudulent claim, the prosecution objected to further questioning on the ground that the

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[1] Without quoting the commingled questions, responses, objections and rulings, suffice it to say that the witness, Sgt Baker, explicitly admitted making the insurance claim, but denied that it was fraudulent. The defense counsel, rather than let the matter rest there, pursued it further, expecting that when confronted with inculpatory statements Sgt Baker made to an Airman First Class Harrington, Sgt Baker's defenses would either crumble or his responses would open the way for an attack under Mil.R.Evid. 613, prior inconsistent statements. By his ruling, the military judge curtailed this latter line of questioning. The idea that a defense counsel must accept an adverse witness' simple denial of wrongdoing without further testing is patently absurd! See Pet. Brief at 6, *infra*.

responses would constitute extrinsic evidence of a bad act under Mil.R.Evid. 608(b).[2]

> The trial judge, in sustaining the objection, ruled,
>
> That it involves collateral matters which *are not relevant* to the determination of factual matters having a direct bearing upon the guilt or innocence of this accused; that they are separated in time and in nature from any issue that is before this court and are *not permissible under the Military Rules of Evidence,* and the government's objection is sustained and we will stay away from it on cross-examination, defense counsel.

(R. 275) (emphasis added).

The defense counsel clearly directed the judge to the issue at hand, Sgt Baker's character for untruthfulness, and correctly explained that the responses sought on cross-examination did not constitute extrinsic evidence. (R. 273). Although the defense was prepared to present extrinsic evidence on the fraudulent claim, such evidence would have been offered under another rule of evidence, Mil.R.Evid. 613, prior inconsistent statements. Because of the military judge's cross-examination ruling, no foundation was established to raise this particular extrinsic evidence issue (which is not challenged herein).

The Air Force Court of Military Review completely missed the issue raised in this petition. The petitioner challenged before them, and still challenges before this Court, the judge's ruling which limited the cross-examination of the government informant. A reading of the Court of Review's decision would lead one to incorrectly believe that the issue raised before them concerned the admissibility of extrinsic evidence to be presented

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[2] Mil.R.Evid. 608 is substantially patterned on Fed.R.Evid. 608. M.C.M. (1984), Analysis of the Military Rules of Evidence, A22-42.

through a defense witness, Airman First Class Gerald L. Harrington. (Pet. App. 3a-4a). The summary decision of the United States Court of Military Appeals provides no help in resolving this discrepancy. The issue presented to the Court of Military Appeals is essentially the same issue now raised before this Court, i.e., whether the judge improperly limited the petitioner's right of confrontation by misapplying Mil.R.Evid. 608(b).

REASONS FOR GRANTING THE WRIT

This Court has repeatedly, as well as recently, emphasized the importance of "the right to conduct reasonable cross-examination." *Olden v. Kentucky*, __ U.S. __, 109 S.Ct. 480, 483 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Davis v. Alaska*, 415 U.S. 308, 315-316 (1974).[3] Although these cases focused on impeachment through a demonstration of bias, the rationale employed by the Court should be no less applicable when impeachment is attempted by showing a witness' character for untruthfulness through specific bad acts disclosed in cross-examination.

In either case, a trial judge is permitted broad discretion when ruling on the scope of cross-examination. The proper exercise of that discretion, however, is subject to constitutional scrutiny under the Sixth Amendment. When a defendant can show that " '[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination' " he is entitled to relief. *Olden v. Kentucky*, 109 S.Ct. at 483, citing *Delaware v. Van Arsdall*, 475 U.S. at 680.

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[3] The Sixth Amendment right to confrontation was expressly held to be applicable in the military in *United States v. Jacoby*, 29 C.M.R. 244 (C.M.A. 1960).

In petitioner's case, the trial judge did not exercise informed discretion. As previously quoted in this petition, the judge ruled that the line of inquiry was not relevant, nor was it permissible under the rules of evidence. In both respects he was wrong. Mil.R.Evid. 608 clearly recognizes and permits an attack on any given witness' credibility and provides a judge discretion in limiting such an attack. The confusion in his ruling may have been rooted in his mistaken belief that cross-examination into specific bad acts amounted to proof of those acts by extrinsic evidence. Such a reading makes Mil.R.Evid. 608(b) a conundrum, devoid of meaningful comprehension.

Mil.R.Evid. 608(b) recognizes the inherent relevancy of specific acts of bad conduct which are probative of credibility. S. Saltzburg, L. Schinasi, & D. Schleuter, *Military Rules of Evidence Manual* 518 (2d ed. 1986). Furthermore,

> The general prohibition on extrinsic evidence does not necessarily mean that the questioner "must take the witness' answer," and abandon his inquiry once a "no" is given; counsel may pursue the investigation by pressing the witness for an admission as long as the questioning is reasonable under Rule 611(a).[4]

[4] In *United States v. Owens,* 21 M.J. 117 (C.M.A. 1985), the court said Rule 608(b)'s prohibition against using extrinsic evidence "does not mean that further cross-examination of appellant is impermissible," rather it allows questions to be rephrased in such a way that appellant wil be induced into abandoning his previous denials.

Id.

Cases which recognize the relevancy of specific bad acts to the question of a witness' character for untruthfulness include *United States v. Owens,* 21 M.J. 117 (C.M.A. 1985) (cited in the above quote) (prior act of intentional falsehood relevant under Mil.R.Evid. 608(b)); *United*

States v. Boone, 17 M.J. 567 (A.F.C.M.R. 1983) (falsified enlistment application probative of untruthfulness); *United States v. Amahia,* 825 F.2d 177 (8th Cir. 1987) (defendant's prior act of insurance fraud probative of untruthfulness); and *United States v. Leake,* 642 F.2d 715 (4th Cir. 1981) (fraudulent financial schemes probative of untruthfulness under Fed.R.Evid. 608(b)). Cases distinguishing proper cross-examination from the improper use of extrinsic evidence by calling witnesses other than the one whose credibility is being attacked include *United States v. Mangiameli,* 668 F.2d 1172, 1175-1176 (10th Cir.), *cert. denied,* 456 U.S. 918 (1982), and *United States v. Leake, supra. See generally* Annotation, *Construction and Application of Rule 608(b) of Federal Rules of Evidence, Dealing with Use of Specific Instances of Conduct to Attack or Support Credibility,* 36 A.L.R. Fed. 564 (1978).

The courts below, failing to find error, obviously did not engage in any harmless error analysis. As a minimum, therefore, this case should ultimately be remanded to determine "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall,* 475 U.S. at 684. The factors to be evaluated "include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.*

CONCLUSION

In summary, the decisions of the trial and reviewing courts are clearly in error and appear to be in violation of the petitioner's right to confrontation under the Sixth Amendment. Considering the similarity of the military and federal rules of evidence, the need for consistency in the application of these rules, and this Court's prior expressions on the proper scope of cross-examination under the Sixth Amendment, a writ of certiorari should issue to review petitioner's case.

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MAY 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 60440/AF
CMR Dkt. No. 26407

UNITED STATES, APPELLANT

v.

STEVEN A. TYLER (306-64-8182), APPELLANT

ORDER

On further consideration of the granted issues (27 MJ 456), it is by the Court this 31st day of March, 1989

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed. Art. 59(a), Uniform Code of Military Justice, 10 USC § 859(a).

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

APPENDIX B

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 26407

UNITED STATES

v.

SENIOR AIRMAN STEVEN A. TYLER, FR 306-64-8182
UNITED STATES AIR FORCE

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25 May 1988

Sentence adjudged 9 July 1987 by GCM convened at Fairchild Air Force Base, Washington. Military Judge: Joseph E. Miniclier.

Approved Sentence: Dishonorable discharge, confinement for ten (10) years, forfeiture of all pay and allowances and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Leo. L. Sergi and Major Frank J. Spinner. Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni and Major Carole W. Hanson.

Before

HODGSON, FORAY and HOLTE
Appellate Military Judges

DECISION

HODGSON, Chief Judge:

The appellant was convicted of various drug offenses involving cocaine and marijuana. The thrust of his appeal

centers mainly around the testimony of Sergeant Mark C. Baker, a government informant and admitted drug abuser, who began assisting law enforcement agents after his liquor purchasing scam was uncovered.

Baker testified he was having financial problems and to ease them he would buy liquor on a credit card at the base package store and later sell it to military and civilian acquaintances at a fraction of the original cost. While the scheme provided an immediate cash flow, the down stream effect was a sizable credit card debt. His activities came to the attention of civilian authorities who suspected him of bootlegging. During the course of this investigation, Baker identified the appellant as an individual who used and distributed drugs and agreed to make controlled buys from him. These occurred on 21 January and on 2 and 6 February 1987, with Baker releasing to military authorities the drugs allegedly sold him by the appellant. Baker also testified he saw the appellant use cocaine and marijuana during this same time frame.

During cross-examination, Baker was questioned at length on his financial problems and his poor management of them. It was during this questioning that Baker denied on accusation by the trial defense counsel that he had submitted a false claim for the theft of a VCR taken from his automobile. Defense counsel then offered the testimony of Airman First Class Gerald L. Harrington that Baker had told him in the spring of 1987, that he [Baker] had submitted a false insurance claim for a VCR he had earlier purchased.

Trial defense counsel claimed he was not attempting to introduce extrinsic evidence of prior bad acts, which is prohibited by Mil. R. Evid. 608(b), but was attempting to establish, through extrinsic evidence, a prior inconsistent statement of the witness, which was admissible under Mil. R. Evid. 613(b). The military judge declined to admit

Harrington's testimony indicating such extrinsic evidence "has a very limited collateral connection with this case [and] . . . was minimally probative of truthfulness."

Appellate defense counsel argue that attacking Baker's credibility through the use of a prior inconsistent statement was "a perfectly legitimate method of impeachment" which was improperly curtailed by the trial judge.

The normal rule of impeachment is that a witness may not be contradicted by extrinsic evidence on a *collateral matter. United States v. Banker,* 15 M.J. 207 (C.M.A. 1983). The reason for this rule is that the introduction of extrinsic evidence would cause confusion and tend to distract the court-members. The subject that trial defense counsel wished to pursue did not have a direct bearing upon the guilt or innocence of the appellant, i.e., the possession, use and distribution of drugs, but was a collateral matter having only peripheral application. *See United States v. Dodson,* 16 M.J. 921 (N.M.C.M.R. 1983). Further, it had nothing to do with "bias, prejudice, or . . . [a] motive to misrepresent" on the part of Baker. Mil. R. Evid. 608(c); *United States v. Burns,* 25 M.J. 817 (A.F.C.M.R. 1988). The extent of impeachment of a witness is within the trial judge's discretion and his ruling in this regard will be reversed only when he abuses that discretion. *United States v. Morales-Quinones,* 812 F.2d 604 (10th Cir. 1987); *United States v. Carr,* 584 F.2d 612 (2d Cir. 1978). We find no abuse of discretion in the trial judge's ruling.

Throughout the trial the appellant contended that Baker's testimony was unbelievable and lacking in credibility. Accordingly, early in the prosecution's case-in-chief, trial defense counsel sought to elicit from the special agent who was handling the case, that Baker had refused to submit to a polygraph test. The prosecution objected to this disclosure and both sides made offers of proof con-

cerning the circumstances surrounding this refusal. *See United States v. Barbeau,* 9 M.J. 569 (A.F.C.M.R. 1980). From the offers of proof it appears that Baker was involved in two polygraph tests—in January 1987, which he took and passed, and one on 10 March 1987, to which he refused to submit. It was the second offered test that trial defense counsel wished to explore.

The prosecution argued that the refusal of a witness to take a polygraph test was irrelevant, but if one test was discussed, then both should be. Trial defense counsel maintained that Baker's refusal to cooperate by taking a polygraph test was "relevant evidence as to his truthfulness." The trial judge considered the subject to be a "mine field," and precluded inquiry by either side in the area.

Less than a week after this trial was completed, the Court of Military Appeals held that the *results* of a polygraph examination are not inadmissible in a court-martial as a matter of law if certain foundational predicates are met. *United States v. Gipson,* 24 M.J. 246 (C.M.A. 1987). In the opinion's penultimate paragraph, Judge Cox stated:

> [W]e do not suggest that all *polygraph evidence* is admissible or that this particular evidence should have been admitted. Appellant still bears the burden of establishing the foundational predicates outlined above. Our holding here is only that the appellant was entitled to attempt to lay that foundation. (Emphasis added).

While the *Gipson* case broke new ground as to the admissibility of the results of a polygraph examination, the case itself was decided on procedural grounds.

The facts in *Gipson* and those at bar are completely different. In *Gipson,* the appellant attempted to introduce the *results* of a polygraph which indicated he was truthful in denying the commission of the charged offenses. Such

testimony would have a direct bearing on his guilt or innocence. Here, the proffered evidence was that a crucial government witness had refused, on one occasion, to submit to a polygraph examination. Such evidence had no direct relationship to the appellant's guilt, but was a fringe issue at best.

Mil. R. Evid. 402, like its federal counterpart, states: "All relevant evidence is admissible." Mil. R. Evid. 401 indicates that evidence is relevant if it has "any tendency" to make an issue in the case "more or less probable" than it would have been without the evidence. *See United States v. Johnson,* 20 M.J. 610 (A.F.C.M.R. 1985).

In our view the refusal of a witness to take a polygraph examination does not tend to make it more probable or less probable that he is telling the truth. There can be many reasons entirely consistent with truthfulness as to why a witness may not wish to submit to an examination with the aid of a "lie detector." *See United States v. Cloyd,* 25 C.M.R. 908 (A.F.B.R. 1958) (Error for police officer to testify that prosecution witness had submitted to a lie detector examination but that the accused refused to do so.) There is substantial case law that the government cannot bolster the credibility of a prosecution witness by establishing that the individual had undergone a polygraph examination or was willing to. *United States v. Dolan,* 17 U.S.C.M.A. 476, 38 C.M.R. 274 (1968); *United States v. Hilton,* 772 F.2d 783 (11th Cir. 1985); *United States v. Smith,* 565 F.2d 292 (4th Cir. 1977); *State ex rel Fields v. Maggio,* 368 So.2d 1016 (La. 1979). It is only logical that an accused should not be allowed to challenge a witness's credibility by establishing a refusal to undergo a "lie detector test." Such a circumstances has the clear potential to divert the fact-finders into an area not directly related to the issue of guilty or innocence.

Therefore, we hold that neither the willingness nor the unwillingness of a witness to take a polygraph test is admissible. Such evidence is not probative of the witness's truthfulness. *United States v. Ferris,* 719 F.2d 1404 (9th Cir. 1983); *People v. Paul,* 144 Cal. Rptr. 431 (1978); *People v. Thorton,* 114 Cal. Rptr. 467 (1974); *See also United States v. Soundingsides,* 820 F.2d 1232 (10th Cir. 1987). The trial judge correctly excluded any reference to the refusal of the witness to take a polygraph test.

Finally, the appellant contends there is insufficient evidence to convict him of possessing cocaine between 20 January-5 February 1987 (Specification 9 of Charge II). We agree. The evidence on this allegation was provided by Airman First Class Earleen Brown, a next door neighbor and former paramour of the appellant. Brown testified that while she was in the appellant's house, she "found a mirror with some powder on it." The substance was "white" and "shaped in a line about an inch and a half to two inches long." At the time she had no idea what the substance was. Later, a law enforcement agent showed her a substance he represented to be cocaine. Brown thought the two white powders "were kind of similar," but "what [the agent] showed [her] had chunks in it and what [she] saw [at the appellant's house] didn't." With the evidence in this state, we are not convinced beyond a reasonable doubt as to the appellant's guilt on this allegation. Accordingly, Specification 9 of Charge II is dismissed. Article 66(c), U.C.M.J.

The action just taken requires that we reassess the sentence. Upon doing so, we find the sentence to be entirely appropriate in light of the affirmed guilty findings and the appellant's disciplinary history which includes a prior conviction for trafficking in drugs. We are convinced that the adjudged sentence is appropriate in rela-

tion to the affirmed guilty findings and is no greater than that which would have been imposed if the prejudicial error had not been committed. *United States v. Sales*, 22 M.J. 305 (C.M.A. 1985). The findings of guilty, as modified, and the sentence are

AFFIRMED.

Senior Judge FORAY and Judge HOLTE concur.

[SEAL]

OFFICIAL:

/s/ Carole V. Petti
CAROLE V. PETTI
Clerk of Court
Court of Military Review

U.S. GOVERNMENT PRINTING OFFICE: 1989 - 236-818/62001